FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931.

No. 296

UNITED STATES NAVIGATION COMPANY INC.,

Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

INTRODUCTORY ANALYSIS

The petitioner's bill of complaint should be dismissed on consideration of the all inclusive provisions of the Shipping Act, 1916, quoted in Appendix A, p. 29, and of two official acts of the Shipping Board pursuant to said statute, all subject to judicial notice.

I. By resolutions or June 16 and July 13, 1926, the Shipping Board instituted under Sec. 22 of the Shipping Act "a proceeding of investigation and inquiry" into the lawfulness of the practice of certain carriers charging "contract" and "non-contract" rates by virtue of Secs. 16 and 17 of the Shipping Act, which proceeding, after hearing, the Board dismissed by its resolution of February 23, 1927. Thus the

Shipping Board under the Shipping Act assumed jurisdiction of the only substantial matter presented to the Court by the bill of complaint.

These several resolutions of the Shipping Board are attested under the seal of the Board on certificate which is annexed to the original brief filed herein (Appendix B, p. 37). The proceeding which the Shipping Board conducted was known as "Contract Rate Investigation, Ex Parte 5". At the hearing November 10, 1926, petitioner's counsel appeared on its behalf and was heard by the Board.

II. The other act of the Shipping Board above referred to was approval by it March 19, 1929, before this bill was filed, of "Conference Agreement No. 16", pursuant to Sec. 15 of the Shipping Act. Copy of said agreement with approving resolution as attested by certificate under seal of the Shipping Board is annexed to the original brief filed herein (Appendix D, p. 44).

We have presented the foregoing in order that this Court may have as complete an understanding as is possible on the state of the record (motion to dismiss the bill) of the questions that are in reality presented, not merely by the restrictive allegations of the bill, but by those allegations as understood when read in the light of other incontestable facts, *i. e.*, governmental acts which should be judicially noticed. The propriety of judicial notice of governmental acts is established by the following cases: *Caha* v. *United States*, 152 U. S. 211, 221-222; *Jones* v. *United States*, 137 U. S. 202, 214-216; *Thornton* v. *United States;* 271 U. S. 414, 420; *United States* v. *Porto Rico Fruit Union*, 12 F. (2d) 961; *United States* v. *Flournoy Live Stock & Real Estate Co.*, 71 Fed. 576, 577-578; *Southern Pac. R. Co.* v. *Groeck*, 68 Fed. 609, 612.

In the case last cited the Circuit Court, relying on this Court's decision in *Caha* v. *United States, supra,* took judicial notice that an order of withdrawal made by the Secretary of the Interior had been revoked, contrary to allegation of the bill that the order remained in force. If the bill in the case at bar is to be read as stating that coöperation between the respondent carriers has not been approved by the Shipping Board (see R. 27), then we respectfully suggest that this Court should judicially notice, to the contrary, that the respondent carriers do have an approved charter of coöperation from the Shipping Board.

All of the steamship company respondents are parties to the Conference Agreement just referred to, which contemplates complete coöperation in the steamship trade. Paragraph 5 thereof shows that any other steamship operator is free to join the Conference. Thus in the practical sense there is no possibility of monopoly. On the other hand, any steamship operator who for competitive or other reasons does not choose to join the Conference is not obliged to do so. It was one of the major purposes of the Shipping Act to permit complete combination and coöperation between ocean carriers, and relieve the same from possible condemnation under the Anti-Trust laws; but at the same time it reserved to and conferred on the Shipping Board complete supervision and control of their agreements and practices.

Up to the time of the filing of this bill the practice of charging "contract" and "non-contract" rates, dependent on whether shippers send all their shipments for a stated period by a particular steamship line or group of lines does not seem to have fallen under charges of violating the Anti-Trust laws. A contract to forward all shipments by a certain line necessarily excludes forwarding part of them by some other line. Error (if any) in the practice inheres quite as much in such

contracts made by a single line as by a number of lines acting in concert.

This practice is by no means novel. It existed in full vigor at the time that the House of Representatives Committee on Merchant Marine and Fisheries investigated the shipping industry under House Resolution 587, 62nd Congress, 2nd Session. In Vol. 4 of its Report (Investigation of Shipping Combinations, 63rd Congress) the Committee described the practice but did not condemn it. (See Report at pp. 287-291.) The Shipping Act, 1916 was largely based on the recommendations of that Report (pp. 415-421) but did not condemn this practice. The Act did condemn by Sec. 14 certain of the practices which the report had condemned, namely, deferred rebates and fighting ships. Sec. 14 (Fourth) forbade "any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered", etc. This necessarily left with the Shipping Board judgment as to what contract might be "unfair or unjustly discriminatory", and it was only such that were prohibited.

Further, the Shipping Act by Secs. 16 and 17 reposed in the Shipping Board power to sufficient to forbid, correct or modify any practices which it should find were detrimental to the interests of shippers or commerce generally. In its Contract Rate Investigation above referred to the Shipping Board did not find that the practice was detrimental and dismissed the proceeding, merely putting the evidence on file. See Appendix C, p. 41.

From the Minutes of that proceeding (pp. 180-182) it appears that counsel for the petitioner there stated, among other things:

"There are practical necessities for exclusive contracts.

"The statute, however, provides, and I would have your attention directed to this: as I think Mr. Campbell suggested,

that while the deferred rebate is specifically prohibited by the statute, the exclusive contracts are not, and the statute provides that only unfair—I think the language is unjustly discriminatory contracts shall be prohibited. I had rather thought that somewhere in this proceeding we would come at what seemed to me the real question, namely, what is an unfair contract? By what means are we to determine whether or not it is unfair? I had thought out in a very general way that question, and I may state it now and hope that it may be of some assistance to the Board.

"It seems to me that the exclusive contract may have three points of abuse—first, the differential between the contract rate and the open rate may be very slight, or it may be very large. I think that point has not been touched on. The decision of Judge Lacombe in the old *Prince Line* case has been referred to and Judge Lacombe, I think, very ably points out—and I think it is in economics as good law now as it was then—that a reasonable concession in amount in quite lawful and quite necessary. The amount which he mentioned was 10 per cent.

"Now whether in any particular trade or any particular contract, 10 per cent is fair or unfair, I do not know, but I do think that the difference between the open rate and the contract rate is an important element in determining whether the exclusive contract rate is within or without the statute. I feel quite certain that a 50 per cent differential is at least not for the best interests of all concerned. Probably, undoubtedly, 5 per cent differential is. I wish to throw that out merely as one of the criteria by which the fairness is to be determined. I think another is connected with the time when the epidemic of exclusive contracts breaks out. It scarcely seems possible that the only object of an exclusive contract is to benefit the shipper when there are no exclusive contracts in a trade until the competitor appears. It therefore seems to me that some inquiry would be pertinent as to whether exclusive contracts are day in and day out occurrences in all these trades, or whether they are synchronized with the advent of competition. There is a suggestion that Congress thought that was material in section 19, I think it is of the statute.

"The third element which seems to me to enter into the question of determining whether a contract practice is reasonable, is that of interlocking arrangements. I can think of possible unfairness in making a contract rate to ports A,

B and C, dependent on that shipper signing up an exclusive contract to ports D and E because conditions might be very different, and there might be other motives as to ports D and E than merely benefiting the shipper."

We do not understand that the type or form of the contracts referred to in the bill (no copy is annexed thereto) differs substantially from the form of contract which the Merchant Marine Committee had under consideration in its Report above referred to. We doubt that the petitioner by its bill intends to do more than state the legal effect of the contracts about which it complains, *i. e.*, as requiring shippers to agree not to send shipments by vessels of the petitioner's line, except as that is to be implied from agreement to send them by respondent's lines. In other words, we do not understand that petitioner contends that the assailed contracts provide, in so many words, that shippers may not forward goods by petitioner's line.

So far as the bill is based on complaints which might be made by shippers the petitioner has no standing to seek an injunction. Shippers are amply protected in their own right by various provisions of the Act. If shippers should deem themselves injured it would be for them to proceed, also before the Shipping Board.

Petitioner errs fundamentally in placing the contracts between carriers and shippers in the category of agreements which require approval by the Shipping Board before they can be put into execution. It is only agreements between carriers that require such approval.

Furthermore, petitioner errs in assuming that any agreement between carriers not approved by the Shipping Board is necessarily condemned by the Anti-Trust laws. Obviously the exemption in Sec. 15 of the Shipping Act was only intended to relate to such combination or coöperation as

would have been condemned by the Anti-Trust laws before the Shipping Act was passed, and it did not imply that every form of coöperation was except for such exemption condemned by the Anti-Trust laws.

The argument for petitioner overlooks that the Shipping Act fully protects its rights and interests as well as those of the respondents. Section 29 of the Shipping Act distinctly provides in respect of violation of any order of the Board made after hearing that the District Court "shall enforce obedience thereto by writ of injunction or other proper process, mandatory or otherwise". If determination by the Shipping Board of the matters complained of by the petitioner should result in an order to these respondents to modify or discontinue the contract rate practice, the petitioner could secure enforcement of such order by the District Court. The determination by the Shipping Board would have the advantage of uniformity which could hardly be expected in the decisions of the various Courts which might be applied to for determination of such a question, if the present effort of petitioner should prevail.

The petitioner errs in applying first to the Court rather than to the Shipping Board. The proper procedure is exactly the reverse, application to the Shipping Board first and then (a) either Court review of its action if unsatisfactory to the petitioner, this by virtue of Section 31 of the Shipping Act; or (b) Court enforcement of the Shipping Board's order under Section 29.

Petitioner mistakes its remedy in arguing that the Shipping Act should not be taken to repeal the Anti-Trust laws. The Shipping Act does not purport to do this nor does it have such effect. See *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156. It is wholly immaterial to the petitioner what the status of the Anti-Trust laws may be in relation to the Ship-

ping Act, because the Shipping Act affords the petitioner at the proper time all the relief it could conceivably secure under the Anti-Trust laws, even if applicable to this case. The powers given to the Shipping Board by the Shipping Act are so broad that action of a Court in proceeding under the Anti-Trust laws might be nullified by decision of the Board.

The Shipping Board has dealt with a substantial number of cases, more than 70 according to its docket. Court review of its decisions has been had in several instances. See *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663; *Isthmian S. S. Co. et al.*, v. *United States*, 53 F. (2d) 251.

The opinion of A. N. Hand, *C. J.* (R. 53-70) deals thoroughly with the more important propositions which are the subject matter of this brief.

FIRST POINT

THE SHIPPING ACT, 1916, AFFORDS PETITIONER ALL THE RELIEF REQUIRED BY THE ALLEGATIONS OF THE COMPLAINT, AND IT COVERS THE ENTIRE FIELD OF ACTIVITY OF THE SHIPPING INDUSTRY.

The pertinent provisions of the Shipping Act are quoted in Appendix A hereto, p. 29.

The position is summarized by the language of Hand, *C. J.* (R. 64):

"The Shipping Act provides complete remedies for all the alleged wrongs, and, in the absence of investigation by the Shipping Board, it is impossible to say whether there is a substantial grievance."

What the petitioner seeks is not the relief so clearly afforded by the Shipping Act, but injunctive process of the

courts under the Clayton Act, which would circumvent the investigation contemplated by the Shipping Act as a prerequisite to any order of the Shipping Board either upholding or condemning the contract rate practice which the petitioner assails.

After *but not before* the making of such order by the Shipping Board the petitioner as well as the respondents may have a day in court and then have an injunction if that is then a requisite and appropriate remedy.

Failure to follow this order of procedure would disrupt the purposes of the Shipping Act and would prevent solution by a central administrative body, (the Shipping Board) of the factual questions raised by this bill—to the prejudice of the ocean commerce of the country, and very likely also to the prejudice of the petitioner and the respondents, who are equally interested in uniformity of decision in such matters. It is hardly conceivable that uniformity would result from the decisions of various courts. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440.

Secs. 14, 14(a), 16 and 17 of the Shipping Act comprehend all the matters about which petitioner complains, and Secs. 21 and 22 provide for investigation thereof by the Board.

The Shipping Act may be properly described as a new charter for the shipping industry, and it set a new departure in the public policy of this country in respect of shipping combinations and practices.

The Act recognized as legal various acts and practices of steamship carriers that theretofore had not been approved, but had been condemned either by common law or statute, and imposed on them supervision and regulation which had not existed before. Propriety of any act of steamship carriers in foreign commerce must now

be judged against the statutory background of the Shipping Act, of which the Shipping Board is administrator. Shipping agreements and practices, whether affecting the interests of the general public or particular shippers or carrier competitors, are now subject exclusively to the restrictive or permissive provisions of that Act and regulation of the Shipping Board thereunder, for test of their propriety.

The complexity of the shipping industry had become such that Congress deemed it proper to entrust supervision and regulation to the Shipping Board, and thus relieved the courts (except for review of Board decisions) of a burden which they could only inadequately and with difficulty discharge, this because of their limited facilities for investigation. Economic considerations, competitive conditions and matters of business policy must frequently be considered in measuring propriety of a particular agreement or practice, and this requires a central administrative body to deal with those questions which fall within the purview of the Shipping Act. An administrative body such as Interstate Commerce Commission or Shipping Board is less restricted by the rules of evidence than are courts. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44.

By reason of this primacy of the Shipping Act, cases which arose before its passage have slight bearing on the questions now presented.

However, it is not to be assumed that Sec. 15 of the Shipping Act, providing for exemption from the Anti-Trust laws of agreements between carriers which the Shipping Board should approve, was the first intimation that certain carrier agreements might not be subject to condemnation under the Anti-Trust laws. As early as 1911 in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 63 this court held that combinations were unlawful under the Anti-Trust laws only when constituting

unreasonable restraints of trade or commerce. Lacombe, *C. J.*, upheld the legality of a Conference between steamship carriers even before the Shipping Act, *U. S.* v. *Hamburg American Line,* 216 Fed. 971. In determining matter of reasonableness a multiplicity of factors must always be considered. As this court said in *Chicago Board of Trade* v. *U. S.,* 246 U. S. 231, 238:

"To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

It is evident that questions of this nature are much more appropriate for investigation and determination by an administrative body than by a court.

It stands to reason that if under the Shipping Act, the Shipping Board has or could have jurisdiction of the matters alleged in the bill, that jurisdiction should be invoked by petitioner and exercised by the Board, the same as jurisdiction of a court. In *Mitchell Coal Co.* v. *Penn. R. R. Co.,* 230 U. S. 247, this court substantially so held in respect to the jurisdiction of the Interstate Commerce Commission—and this notwithstanding that Sec. 9 of the Interstate Commerce Act gave the complainant option of resort to the court. Possibly that option was inserted in Sec. 9 of that Act because of doubt by Congress of its constitutional right to entrust matters to the exclusive jurisdiction of the Commission in the first instance. Any such doubt was resolved long since and this court held in the *Mitchell* case that notwithstanding the statutory option the complainant must resort in the first instance to the Commission. This may explain why in the

Shipping Act no option of prior resort to the court was included, thus implying that complainants must resort to the Board first.

The nature of the complaint made by petitioner is such that it involves determination of whether the assailed contracts between carriers and shippers fall within the condemnation of "unfair or unjustly discriminatory" in Sec. 14, or "undue or unreasonable preference or advantage" or "undue or unreasonable prejudice or disadvantage" in Sec. 16, or "any rate, fare, or charge which is unjustly discriminatory" or "unjust or unreasonable" practice in Sec. 17 of the Shipping Act. It is only by thorough investigation and weighing of many facts that such questions can be determined. Whether the purpose of the contract is something different from protection and advancement of the legitimate business interests of the respondents and their shippers, or whether the contracts have some sinister purpose *versus* other carriers (*e. g.* petitioner) must always involve consideration of surrounding facts and circumstances under Secs. 14, 16 or 17 of the Shipping Act, and this consideration must deal with much shipping history, and relations between carriers, and relations between them and their shippers; and must also cover a wide range of commercial matters. See *U. S.* v. *Hamburg American Line,* 216 Fed. 971; *U. S.* v. *Prince Line,* 220 Fed. 230.

It further stands to reason that questions involving extent of coöperation between these respondent carriers by virtue of the Conference agreement which the Shipping Board approved March 16, 1929, Appendix D, p. 44, should be dealt with by the Board. That approved agreement provides for coöperation on rates, without specification or limitation as to whether they shall be contract rates or otherwise. Presumably any method of coöperative rate charging is approved by that agreement. Also, paragraph 2 of the agreement pro-

vides that the carriers may "in all such ways as may be proper endeavor to stabilize and otherwise improve the steamship and export trade". As we have already mentioned, other steamship operators are permitted to enter this Conference by express provision in Paragraph 5 of the agreement.

Since before approving this broad agreement the Shipping Board was required by Sec. 15 of the Act to find that it was not "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this Act", it seems to follow that it is the business of the Shipping Board to determine whether the contract rate practice is comprehended by the broad provisions of the agreement and (whether this is so or not) to determine whether that practice in any way violates any provision of the Shipping Act.

SECOND POINT

THE BILL ON ITS FACE RAISES ADMINISTRATIVE QUESTIONS AND PETITIONER IS NOT PERMITTED TO ELIMINATE THE SAME FOR THE PURPOSE OF AVOIDING RESORT TO THE SHIPPING BOARD.

The bill alleges in respect of difference between the contract and non-contract rates (R. 9):

"The disproportionately wide spread of these differentials was wholly arbitrary and unreasonable," etc.

And also alleges (R. 8):

"The charging of such far lower rate under such joint exclusive contracts is not, and is not intended to be, conditioned upon the volume of traffic offered by the shipper, the number of shipments made or the regularity with which shipments are made; nor is the spread of the differential between such

joint exclusive contract rate and such far higher general tariff rate in any way predicated upon the volume of traffic or the frequency or regularity of shipment, such differential being purely arbitrary and wholly disproportionate to any difference in service rendered, and being determined solely by a consideration of what differential will be effective in coercing a shipper to agree to refrain from making shipments in said trade from the United States to Great Britain by the vessels of the plaintiff."

Judge Caffey in the District Court said (R. 44):

"The spread between the two sets of rates could not exist as the foundation of the device or of the practices assailed by the bill unless the tariff rates were unreasonably high or the contract rates were unreasonably low. It seems to me therefore to follow that a large proportion of, and I believe all that is material in, the charging part of the bill consists of or includes offenses against the Shipping Act."

And Hand, *C. J.*, in the Circuit Court of Appeals, said (R. 63):

"If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission."

Nevertheless, petitioner at page 7 of its brief states:

"The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by jointly requiring these exclusive patronage contracts. The allegations as to the rates themselves are merely descriptive of some of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable, but this is neither the basis nor a necessary element of the cause of action."

This seems to us to seek a revision or limitation of the allegations of the bill. Such is not permissible. See *D. L. & W. R. R. Co.* v. *Koske*, 279 U. S. 7, 9-10.

The petitioner apparently thus seeks to modify its charges so as to complain of the mere existence of the contract rate practice, for it states at page 38 of its brief:

"The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the respondents of the exclusive patronage contract and their joint refusal to carry at a given rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade."

The decision of the Shipping Board in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.* in 1922 is referred to by petitioner at page 42, *et seq.* in support of its contention that question of reasonableness of the differential between contract and non-contract rates is not in reality involved—although featured in the bill. It should be enough to say that the *Eden Mining Co.* case was decided by the Board on the facts and circumstances there appearing, and the Board said (R. 25):

"It should be here remarked, however, that we do not decide whether under that [Shipping] Act the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

When hearing was held by the Shipping Board November 10, 1926, in its Contract Rate Investigation (Appendix B, p. 37) counsel for petitioner did not take the position that the contract rate practice was prohibited by law, but approved it within certain limits, as appears from counsel's remarks which we have quoted *supra* (pp. 4-6), and also from other remarks which counsel for petitioner then made, as follows, as appears from Minutes (pp. 179-180, 182-183) of that hearing:

"We feel the force of a great deal that has been said by the Conference representatives, and it therefore did not occur

to our point of view that the exclusive contract in and of itself was a bad thing in the trade. Of course we had the decision of the Board in the Eden Mining case, which looked that way; clearly that decision should [not] be construed as holding that all exclusive contracts, by reason of the fact that they are exclusive contracts, are invalid. It would seem to me a pity if it was construed as strictly as that for the reasons which have been gone into today, and which are familiar to every shipping man.

* * * * * * *

I really feel that the ultimate solution of this question—and it is the thing after all that my client is interested in—depends on some gradual evolution by this Board of a basis on which the fairness of the contract practice under the Act is to be determined, and I see no way in which it can be done without gradually working out some criteria against the background of which the individual case can be projected."

Thus not only by the *caveat* stated by the Board in the *Eden Mining* case itself, but also by the position taken by the petitioner in a subsequent hearing before the Board on the matter of contract rates, it is demonstrated that that case is no support for the petitioner's argument. Neither could it be a binding precedent for Board action in any other case. *Eagle Cotton Oil Co.* v. *Southern Railway Co.*, 51 F. (2d) 443, 446.

THIRD POINT

PETITIONER MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SHIPPING BOARD.

Petitioner in Paragraph 72 of its bill alleges (R. 28):

"Said agreements and understandings are of such terms and character that they could not lawfully be approved by the United States Shipping Board under the provisions of said Shipping Act of September 7, 1916."

This is preceded by allegation in Paragraph 71 (R. 28) to effect that the Shipping Board in the *Eden Mining* case held that the practice of granting contract rates for exclusive shipments lower than the tariff rate charged other shippers who refused to make such exclusive contracts "was discriminatory and illegal under Sections 16 and 17 of the Shipping Act".

The bill does not mention the Contract Rate Investigation, wherein the Board by Resolution of February 23, 1927, dismissed its "proceeding of investigation and inquiry" (Appendix B, p. 37), which was also held under Secs. 16 and 17 of the Shipping Act, without any finding either for or against the contract rate practice.

We have already pointed out that the *Eden Mining* decision is necessarily limited to its own facts. These did not include many of the facts which would necessarily be involved in determination of the questions raised by the allegations of this bill and by the provisions of the Shipping Act itself.

Petitioner's purpose in Paragraphs 71 and 72 of its bill as just referred to doubtless is to have it appear that because of the Board's decision in the *Eden Mining* case it is established as matter of law that the contract rate practice could

not lawfully be approved by the Board. This is to assume the very point which the complaint would put at issue. Even Swan, *C. J.* in his dissenting opinion fell into the error of accepting this allegation of the complaint, saying (R. 71):

"In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board."

The allegations in the bill which are matters of law as distinguished from matters of fact are not admitted by the motion to dismiss, which is in the nature of a demurrer. That only facts well pleaded are admitted, for sake of the argument only, is too well settled now to be questioned. In *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 254, Mr. Justice Butler said:

"The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Ins. Society* v. *Brown,* 213 U. S. 25, 43; *Southern Ry. Co.* v. *King,* 217 U. S. 524, 536; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500."

See also *St. Louis, etc. R. R.* v. *U. S.,* 267 U. S. 346, 348-349; *Straus* v. *Foxworth,* 231 U. S. 162, 168; *Chicago Junction Case,* 264 U. S. 258, 262-263; *L. & N. R. R. Co.* v. *Palmes,* 109 U. S. 244, 253.

Contention that the Shipping Board could not lawfully give its approval is analogous to contention which was made in respect of decision by the Land Department, which was before this Court in *Cosmos* v. *Gray Eagle Co.,* 190 U. S. 301, 308:

"If the Land Department has any jurisdiction over the subject matter, the question as to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal

conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it."

Petitioner's bill errs in describing the contract rate practice as matter of "agreement" between the respondents. The contracts are contracts between carriers and shippers, and not contracts between carriers. The petitioner thus seeks to assimilate these contracts to other contracts, *i. e.*, those strictly between carriers, which are the subject matter of approval by the Shipping Board under Sec. 15 of the Shipping Act.

The Act does not contemplate that contracts between carriers and shippers shall be approved by the Board before being put into execution. It is obvious that if such prior approval were required the mass of detail involved would make it hardly possible for the Board to function, to say nothing of inability of the shipping public to do business.

The truth is that these contracts are matters of practice only, comprehended by Secs. 14, 16 or 17 of the Act, and that Sec. 15 of the Act is limited to approval of what may be called important or basic agreements between carriers, within which of course may be comprehended any number of minor matters—and it is hardly important whether these be described as matters of agreement or matters of practice.

Up to the time of filing of this bill we are not aware that it was ever contended that contracts with shippers providing certain rates less than the open tariff rates should be filed with the Shipping Board for approval. Certainly the Board itself has never taken that position, although it has had opportunity to do so. The Board made a "Section 15 Inquiry", Ex Parte 4, and its Report of August 16, 1927, and Rules later promulgated, did not require that carriers should secure its approval of such contracts pursuant to Sec. 15.

The Board nevertheless does have power to require the filing with it of such contracts by virtue of Sec. 21 of the Act, which requires filing on demand of "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier", etc. This enables the Board to inform itself so as to take, either on its own motion or on complaint under Sec. 22, such proceeding as it may deem appropriate for infraction of any provision of the Act. In other words, all practical purposes are served by letting the shipping public do business in the regular way without restriction, reserving to the Board full power to correct any evils that may crop out.

FOURTH POINT

PRIMARY RESORT TO THE SHIPPING BOARD IS REQUIRED BY THE SHIPPING ACT BY ANALOGY WITH REQUIREMENT OF PRIMARY RESORT TO THE INTERSTATE COMMERCE COMMISSION AND OTHER REGULATORY BODIES.

The structure of the Shipping Act shows that it was based largely on the Interstate Commerce Act, and its purposes in respect of ocean commerce appear clearly to be analogous to those of the Interstate Commerce Act in respect of land commerce. One act, like the other, must be read as a whole and interpreted "with due regard to its manifest purpose." *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 323. The judicial construction applied to one Act is appropriate to the other. *Brewster* v. *Gage,* 280 U. S. 327, 337; *National Lead Co.* v. *U. S.,* 252 U. S. 140, 146-147; *U. S.* v. *Faulk,* 204 U. S. 143, 152.

This Court has made many decisions which confirm the necessity of preliminary resort to the Commission. The law was succinctly stated by Mr. Justice Brandeis in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, suit was brought under Sec. 7 of the Anti-Trust Act to recover treble damages alleged to have been sustained as a consequence of the combination of the defendants in enforcing arbitrary and unreasonable rates. This Court found this to be a matter for the Interstate Commerce Commission, and Mr. Justice Brandeis said (163):

"If a shipper could recover under §7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher

submitted to the Secretary of Agriculture under the Packers and Stock-Yards Act, the Court saying:

"A contrary ruling would upset a useful, time-saving, economical and established practice."

In respect of the case at bar, Hand, *C. J.*, put the situation clearly when he said (R. 67):

"Proof of the existence and extent of the grievances complained of will require investigations in a special field demanding expert knowledge. The alternative to proceeding before the Board seems appalling."

And, further (R. 69):

"It is notorious that such charges as are made here are not disposed of by admissions, but in the end result in protracted trials and in the resolutions of complicated problems and disputed questions of fact and economics. * * * Every practical consideration favors resort to a tribunal specially equipped and experienced to deal with such matters. The Shipping Board seems to have been designed to aid the courts and to relieve them of investigation and preliminary determination. We think every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present. That tribunal has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the Act."

The Shipping Act is stronger on the analogy than the Interstate Commerce Act, since Sec. 22 of the latter, 24 Stat. L, 387, specifically provides that it shall not "in any way abridge or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies." The same is also true of Sec. 11 of the Federal Trade Commission Act, 38 Stat. L. 717. The Shipping Act does not contain any such exception, and this strongly implies that no exception to its exclusive operation was intended or is permitted.

FIFTH POINT

PETITIONER'S AUTHORITIES DO NOT SUPPORT ITS CONTENTION AGAINST REQUIREMENT OF PRIOR RESORT TO THE SHIPPING BOARD.

Hand, *C. J.*, in his opinion discussed and distinguished the principal cases cited for petitioner in the Circuit Court of Appeals (R. 59-63). We shall not here distinguish petitioner's cases at length. It may be said of them that they do not govern this case or lessen the authority of the cases we have cited for the respondents, either (1) because the question involved or raised was not of like nature with the question here; or (2) because the cases arose before the Shipping Act 1916, which stated a new public policy, and that must now be taken into account; or (3) because some of the parties in those cases were not subject to the regulatory statute; or (4) because in those cases there was no field of inquiry left open for a regulatory body prior to action by a Court.

Petitioner refers (Brief, 31) to *China Fire Ins. Co.* v. *Davis*, 50 F. (2d) 389. The opinion of Hand, *C. J.*, at pp. 392-393 shows, however, that

"The question now before us is, not where relief must be sought, but of the lawfulness of a provision in the contract of carriage which violates the statute, in an action where it arises collaterally.

"Even so, it may not be for the courts in the first instance; that depends upon whether the Commission has jurisdiction to approve such a stipulation. * * * But where it is necessary only to construe the statute, * * * we need not await the action of the Commission, which is in that case predetermined. [Citing cases] * * * The character of

the subject matter cannot be determinative if the statute is peremptory. We must decide that no evidence could justify the clause here in question; that to leave it open to shippers to insure or not insure the carriers could not be justified by any facts which might be developed at a hearing before the Commission. In asserting such a negative, as we do, we construe the statute in its declared terms."

In the case at bar the essence of the inquiry is whether the contract and non-contract rates and the differential between them are reasonable or otherwise, and whether this practice of the respondents violates any provisions of Secs. 14, 16 or 17 of the Shipping Act. This involves consideration of justification for the level of the tariff rate and the contract rate, not only separately but in relation to each other, and in relation to the requirements of shippers, and also involves many other matters of a commercial nature, for the possible range of which see the remarks of Lacombe, *C. J.*, in *United States* v. *Hamburg American Line,* 216 Fed. 971, 973. These are clearly matters for a regulatory body to investigate and decide.

How potent is the rule that such matters must first be taken to the regulatory body is illustrated by *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87, much cited by petitioner, where, although this Court reversed the Court below so as to permit the Government to proceed in Court on purely criminal features of the case, nevertheless this Court affirmed the lower Court on primary jurisdiction of the Commission under the Interstate Commerce Act in respect of civil matters. Mr. Justice McKenna there said (107-108):

"The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of

its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

The right of the Government to proceed in Court in prosecution of criminal charges, collection of penalties, etc., is quite a different thing from the right of a private individual to enforce civil claims. This distinction is recognized in the *Keogh* case, 260 U. S. 156, 162, where the private individual was held required first to invoke the aid of the regulatory body, as well as in *U. S.* v. *Pacific & Arctic Co.* just cited.

The Shipping Act does not require the respondent carriers to file their rates and shipping contracts with the Shipping Board unless the Board shall require the same under Sec. 21. Thus there is no basis for distinction of our authorities on the ground that the rates and shipping contracts may not yet have been filed there.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS.

ROSCOE H. HUPPER
CHARLES C. BURLINGHAM
Counsel for Respondents

New York City
January 5, 1932

APPENDIX A

PERTINENT SECTIONS OF SHIPPING ACT 1916 (39 Stat. L. 728).

SEC. 3. * * * The board shall have an official seal, which shall be judicially noticed. * * *

SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

THIRD. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

FOURTH. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 14a. The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other

special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful

restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

FIRST. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECOND. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

THIRD. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 21. That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters

than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under §7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief."

This decision in the *Keogh* case shows also the lack of foundation for petitioner's contention (Brief, p. 22) that the absence from Sec. 16 of the Clayton Act (by amendment) of any exception concerning matters arising under the Shipping Act indicates that such matters were intended to be subject to suit under the Clayton Act without prior resort to the Board. Silence of the Shipping Act (passed two years after the Clayton Act) would seem to be proof positive that division of authority between the Board and the courts was not intended by Congress.

Although Sec. 16 of the Clayton Act excepted matters arising under the Interstate Commerce Act, Sec. 7 of the Sherman Act, under which the *Keogh* case was brought, did not contain such exception. Nevertheless, this Court held that Keogh, a private shipper, could not recover damages under Sec. 7 of the Sherman Act for the loss of rates which he would have enjoyed except for the conspiracy between carriers which he alleged. Mr. Justice Brandeis said (162):

"* * * If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings [before the Commission]. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.*, 162 Fed. 354."

This question was answered in the negative, on the ground, not that matters arising under the Interstate Commerce Act were excepted in the Sherman Act, but that the remedies afforded by the Interstate Commerce Act were exclusive. Other cases to like effect are *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 112 Fed. 823, both decided before enactment of the Clayton Act.

The exclusive character of the Commission's authority has also been emphasized by this Court in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Baltimore & Ohio Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494-495; *Mitchell Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, 255-258; *Midland Valley R. R. Co.* v. *Barkley*, 276 U. S. 482, 487; *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, 497; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 146; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 238-239.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 603, it was said:

"There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the Commission."

In *Sullivan* v. *Union Stock-Yards Co.*, 26 Fed. (2d) 60, 62 (C. C. A., 8th Circ.) it was held that a question of discriminatory charges in the handling of animals must first be

any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

SEC. 23. Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the board other than for the payment of money made under this Act shall continue in force for such time, not exceeding two years, as shall be prescribed therein by the board, unless suspended, modified, or set aside by the board or any court of competent jurisdiction.

SEC. 24. That t[redacted]d shall enter of record a written report of every investigation made under this Act in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

SEC. 27. That for the purpose of investigating alleged violations of this Act, the board may by subpœna compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpœnas may be signed by any commissioner, and oaths or affirmations may be administered, witnesses examined, and evidence received by any commissioner or examiner, or, under the direction of the board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the board and witnesses shall, unless employees of the board, be entitled to the same fees and

mileage as in the courts of the United States. Obedience to any such subpœna shall, on application by the board, be enforced as are orders of the board other than for the payment of money.

SEC. 28. That no person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpœna of the board or of any court in any proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 29. That in case of violation of any order of the board, other than an order for the payment of money, the board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

SEC. 31. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

APPENDIX B

[CONTRACT RATE INVESTIGATION]

UNITED STATES OF AMERICA

UNITED STATES SHIPPING BOARD

WASHINGTON, D. C., JANUARY 4, 1932

I HEREBY CERTIFY that the annexed are true and correct copies of resolutions adopted by the United States Shipping Board at meetings held on June 16, 1926, July 13, 1926, and February 23, 1927, respectively, as shown by the official minutes of the United States Shipping Board in the custody of the Secretary of the United States Shipping Board.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

SAMUEL GOODACRE
Secretary
United States Shipping Board.

[SEAL]

WHEREAS, By its report of October 11, 1922, rendered after investigation upon complaint, the Board determined that the charging by a carrier of higher rates to shippers who refused to agree to patronize said carrier exclusively than to shippers who did so agree was violative of Sections 16 and 17 of the Shipping Act, 1916; and

WHEREAS, It appears certain carriers subject to the jurisdiction of the Board are now engaged in the practice of charging "contract" and "non-contract" rates, whereby shippers agreeing to ship exclusively via said carriers are charged lower rates than shippers who do not so agree; now therefore, it is

RESOLVED, That a proceeding of investigation and inquiry be, and it is hereby, instituted by the Board of its own motion, to determine the facts and to hear argument respecting the lawfulness under the Shipping Act of said practice.

IT IS FURTHER RESOLVED, That the carriers named in the appendix hereto, or which may hereafter be added thereto, be, and they are hereby, made respondents in this proceeding;

AND IT IS FURTHER RESOLVED, That this proceeding be assigned for hearing before the Board at Washington, D. C., at such time or times as may hereafter be directed.

America Levant Line
American Delta Line
American Diamond Lines
American Dispatch Line
American Dixie Line
American Merchant Lines
American Palmetto Line
American Republics Line
Anchor Donaldson Line

Barber Steamship Lines, Incorporated
Black Diamond Steamship Corporation
Booth American Shipping Corporation

Canadian Pacific Steamships, Ltd.
Carolina Company
Cia de Navegacao Lloyd Brasileiro
Columbus Marine Corporation
Compagnie Generale Transatlantique
Consolidated Navigation Company
Cunard Steamship Company, Ltd.

Donaldson Line

East Asiatic Line
Elder Dempster Line
Ellerman's Wilson Line

James W. Elwell & Company
Export Steamship Corporation

Furness, Withy & Company, Ltd.

Garcia & Diaz

Hamburg American Line
Charles Harrington Agency
Harrison Line
Head Line
Holland America Line
H. P. Houston & Company

Inter-Continental Transp. Services, Ltd.
International Freighting Corporation
International Mercantile Marine Co.
Italia-America Shipping Corp.

Lamport & Holt, Ltd.
Leyland Line
Linea Sud Americana, Inc.
Lloyd Royal Belge
Lord Line
Lykes Brothers-Ripley S. S. Co., Inc.

McDonnall & Truda
Maclay Line
Richard Meyer Company

Mississippi Shipping Company, Inc.
Mississippi Valley-European Line
Mobile-Oceanic Line
Moore & McCormack Company, Inc.
Munson Steamship Line

Henry Nanninga Company
National Greek Line
North German Lloyd
Norton, Lilly & Company

Oriole Lines

Phelps Brothers & Company
Prince Line, Limited

Red Star Line
Rogers & Webb
Royal Holland Lloyd
Royal Mail Steam Packet Company

South Atlantic Steamship Line
Southern Shipping & Trading Company
Southern States Line
Strachan Shipping Company

Texas Star Line
Thomson Line
Trosdal, Plant & Lafonta

United American Lines
United Gulf Steamship Company, Inc.
United States Lines

J. A. Van Dohlen Company

Waterman Steamship Corporation
Wilhelmsen Steamship Line
J. H. Winchester & Company, Inc.

Yankee Line

WHEREAS, Under date of June 16, 1926, the Board by resolution initiated an investigation and inquiry concerning the practice of certain carriers charging "contract" and "non-contract" rates; and

WHEREAS, It appears there are in addition, other carriers than those named as respondents in the appendix to said resolution which engage or may engage in said practice; now therefore, it is

RESOLVED, That the following named carriers be, and they are hereby made respondents in said investigation and inquiry:

American-Hawaiian Steamship Company
Argonaut Steamship Company, Inc.
California and Eastern Steamship Company
Dollar Steamship Line
Garland Steamship Corporation
Inter-Ocean Steamship Corporation
Isthmian Steamship Lines

Luckenbach Steamship Company, Inc.
Munson-McCormack Line
Pacific-Caribbean-Gulf Line, Inc.
Panama Mail Steamship Company
Panama Pacific Line
Transmarine Corporation
United American Lines, Inc.
Williams Steamship Company, Inc.

WHEREAS, By resolutions of June 16, 1926, and July 13, 1926, the Board, under authority of Section 22 of the Shipping Act, 1916, entered upon a proceeding of investigation and inquiry in connection with the practice of carriers of charging "contract" and "non-contract" rates; and

WHEREAS, At the outset of the hearing the Board on its own motion discontinued it as a formal hearing in the case, thenceforth proceeding informally, but without prejudice;

RESOLVED, That the proceeding be, and the same is hereby dismissed.

APPENDIX C

EX PARTE 5

CONTRACT RATE INVESTIGATION

[REPORT OF SHIPPING BOARD]

W. L. Barnett, New England Steamship Co., and New York, New Haven & Hartford Railroad Co.; J. A. Beahan, New York, New Haven & Hartford Railroad Co.; W. A. Becker, Brooklyn Chamber of Commerce; Charles S. Belsterling and L. Pfeiff, Isthmian Steamship Lines; Frank N. Bowers, International Freighting Corp.; H. Robert Burney, Williams Steamship Co., Inc.; W. H. Chandler, Merchants Association of New York, National Industrial Traffic League, and Shippers Conference of Greater New York; Harold S. Deming, Booth-American Shipping Corp., and Export Steamship Corp.; Norman Draper, Institute of American Meat Packers; W. C. Duncan, Maple Leaf Milling Co.; C. C. Furgason, West Virginia Pulp and Paper Co.; G. S. Hinkins, Dollar Steamship Line; Roscoe H. Hupper, America Levant Line, American Diamond Lines, American Merchant Line, Anchor Donaldson Line, Canadian Pacific Steamships, Ltd., Columbus Marine Comp., Compagnie Generale Transatlantique, Cunard Steam Ship Company, Ltd., Donaldson Line, Ellerman's Wilson Line, James W. Elwell & Co., Export Steamship Corp., Furness, Withy & Co., Ltd.; Hamburg American Line, Head Line, Holland-America Line, Inter-Continental Transport Services, Ltd., International Mercantile Marine Co., Italia-America Shipping Corp., Lamport & Holt, Ltd., Leyland Line, Lord Line, McDonnell & Truda, National Greek Line, North German Lloyd, Oriole Lines, Phelps Bros. & Co., Red Star Line, Rogers & Webb, Royal Holland Lloyd, Royal Mail Steam Packet Co., United States Lines, and Yankee Line; Kerr Steamship Co., Agents, Wilhelmsen Line; B. Hoff Knight, Port of Philadelphia Ocean Traffic Bureau; Frank P. Latimer, American Palmetto Line, The Carolina Co., Donaldson Line, Henry Hanninga Co., South Atlantic Steamship Line, Strachan Shipping Co., Trosdal, Plant & Lafonta, and J. A. VonDohlen Co.; John McAuliffe, Argonaut Steamship Line; Mark W. Maclay, United States Nav. Co.; J. S. Mahool,

Panama Pacific Line; E. K. Morse, American Dispatch Line, McCormick Steamship Co., Munson-McCormick Line and Munson Steamship Line; J. T. O'Connell, Lloyd Brasileiro; J. B. O'Reilly, American & Manchurian Line, Ellerman & Bucknall Steamship Co., Ltd., and Norton, Lilly & Co.; N. O. Pedrick, American Delta Line, American Dixie Line, Head Line, Lord Line, Lykes Bros.-Ripley S. S. Co., Inc.; Maclay Line, Richard Meyer Co., Mississippi Shipping Co., Mississippi Valley-European Line, Southern Shipping & Trading Co., Southern States Line, Texas Star Line, Trodal, Plant & Lafonta, and United Gulf Steamship Co., Inc.; W. F. Price, New England Traffic League, Manufacturers' Association of Connecticut, and The J. B. Williams Co.; C. A. Richards and C. S. Keene, Merchants' Association of New York; P. M. Ripley, American Sugar Refining Co., and National Industrial Traffic League; W. P. Rudrow, Arrow Line; J. F. Schumacher, Inter-Ocean Steamship Corp.; E. A. Slack, California & Eastern Steamship Co.; Thomas L. Stitt, New York Freight Forwarders and Brokers' Assn.; J. F. Stuart, R. P. Houston & Co.; Joseph N. Teal, American-Hawaiian Steamship Co.; R. C. Thackara, Luckenbach Steamship Co., Inc.; C. A. Torrence, United States Intercoastal Conference; F. B. Townsend, Minneapolis Traffic Assn.; F. J. Wall, The New England Steamship Co.; J. A. Wells, Williams Steamship Co., Inc.; William E. Whelpley, Walworth Company; A. D. Whittemore, American Cyanamid Co.; Ernest F. M. Wye, New York Freight Forwarders and Brokers' Assn.

This proceeding relates to the practices of certain carriers by water whereby shippers who contract to patronize them exclusively in specified services for definite periods of time, are charged less than the rates charged for similar services to shippers not making similar contracts.

The matter came on for hearing November 10, 1926, and the respondents having interposed various objections the Board announced that the hearing would be continued as an informal hearing only, that statements by respondents would be voluntary and not under oath, and that no order prejudicial to any of the respondents would be entered; that the change in procedure, however, was not a concession that the

objections were valid or that the proceeding had been improperly brought either in form or substance.

We recommend that the proceeding be dismissed and that the evidence therein, taken under the circumstances above mentioned, be treated as general information only, taken informally, for possible use in determining what further action, if any, shall be taken with respect to the matters mentioned in the resolutions of the Board dated June 16, 1926, and July 13, 1926.

APPENDIX D

[APPROVED CONFERENCE AGREEMENT]

UNITED STATES OF AMERICA

UNITED STATES SHIPPING BOARD

DECEMBER 28, 1931

I HEREBY CERTIFY that the annexed are a true and correct copy of resolution adopted by the United States Shipping Board at a meeting held on March 19, 1929, and true and correct copy of the agreement referred to therein as shown by the official records of the United States Shipping Board in the custody of the Secretary of the United States Shipping Board.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

S. D. SCHELL
Acting Secretary
United States Shipping Board.

[SEAL]

RESOLUTION

WHEREAS, Pursuant to the requirements of Section 15 of the Shipping Act, 1916, there has been filed with the Board for its approval memorandum of agreement between certain carriers by water; and

WHEREAS, Examination has been duly made of said agreement, as evidenced by the memorandum filed, under the regulatory provisions of the Shipping Act, as amended; now, therefore, it is

RESOLVED, That agreement bearing United States Shipping Board Bureau of Regulation Conference Agreement Number 16, between American Line, American Merchant Lines, Anchor Line, Anchor-Donaldson Line, Atlantic Transport Line, Bristol City Line, Canadian Pacific Steamships, Ltd., Cunard Line, Dominion Line, Donaldson Line, Ellerman's Wilson Line, Furness Lines, Head Line and Lord Line, Lamport and Holt Line, Leyland Line, Manchester Liners, Ltd., Oriole Lines, Royal Mail Steam Packet Company, Thomson Line, United States Lines, and White Star Line, be, and the same is hereby, approved.

Bureau of Regulation
Conference Agreement No. 16
Dated: March 7, 1929
Filed: March 14, 1929
Approved: March 19, 1929.

On motion duly made and seconded, it was, after discussion, Resolved:

WHEREAS, there was filed with the United States Shipping Board on or about February 24th, 1917, Liverpool, London, Manchester and Glasgow Rate Agreements which had been entered into in behalf of the several Lines named respectively therein, and showing, among other things, that said Lines were then in agreement on minimum rates in the respective services covered by said several rate agreements, and had for some years prior thereto met to agree on rates, which practice has been followed up to the present time, and on or about March 23, 1920, the United States Shipping Board was advised that the Bristol City Line, Ellerman's Wilson Line, Head Line and Thomson Line had joined in consideration of minimum rates with the other Lines mentioned in the aforesaid minimum rate agreements, so that with the addition of the American Merchant, Oriole and U. S. Lines on March 4th, 1925, and the Royal Mail Steam Packet Co. on August 6th, 1925, the Lines participating in the making of agreements as to minimum rates now are, as follows:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line

Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

and

WHEREAS, the said several Lines above named operating under the aforesaid rate agreements on account of expanding some of their services so as to include additional ports, assumed for convenience with the respect to the aforesaid four rate agreements the general designation of North Atlantic United Kingdom Freight Conference, of which the United States Shipping Board was advised on or about April 30th, 1920, which Conference has thereafter to this date been designated as Conference No. 16, but there has been no formal agreement between the aforesaid Lines, in view of which it is now desired to clarify the purposes of said so-called North Atlantic United Kingdom Freight Conference.

NOW, THEREFORE, it is stated and agreed as follows:

1. The membership of said North Atlantic United Kingdom Freight Conference is composed of the several Lines hereinabove named.

2. The purpose of said Conference is to agree on reasonable minimum freight rates over said Lines from North Atlantic ports of the United States and Canada to the several United Kingdom Ports, and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship and export trade.

3. Said Lines shall not unjustly discriminate against, or make any discounts, payments, rebates or returns of any

description, directly or indirectly, to any shipper, contractor, broker (except brokerage), consignee or other receiver of cargo.

4. The meetings of said Conference shall continue to be held at New York or Montreal monthly, or thereabouts, to consider matters of rates and other matters of general interest to the export and steamship trade.

5. Any person, firm or corporation engaged in operating vessels regularly in the trade, may be admitted to membership in the Conference upon agreeing to conform to this resolution and such rules and regulations as may be adopted by the Conference.

And on further motion duly made and seconded it was

RESOLVED that the Secretary be directed to file with the United States Shipping Board for approval under Section 15 of the Shipping Act the foregoing agreement with copy of this resolution.

Filed on behalf of:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

By: SIDNEY E. MORSE, Secretary,
The North Atlantic United Kingdom
Freight Conference.